IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-869

HOUFF TRANSFER, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS.

BRIEF FOR RESPONDENTS

(Additional captions and names of attorneys appear on inside front cover)

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs; FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC.; TWIN EXPRESS, INC.; and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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IN THE

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OCTOBER TERM, 1984

Nos. 84-861, 84-696, 84-677,
84-869, 84-691, 84-684

NATIONAL LABOR RELATIONS BOARD,

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

In the 117 pages of their six separate petitions, ten petitioners have been unable to assert a single reason why the Court should grant certiorari in this case. They have articulated no question of law requiring Supreme Court review.[1] They concede there is no conflict among the cir-

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[1] The questions framed in the petitions run the gamut from "[w]hether the National Labor Relations Board correctly concluded" (No. 84-861) to "[w]hether the court of appeals erred" (No. 84-684) to "[d]id the Court of Appeals apply the proper legal criteria" (No. 84-696) to "[w]as the Circuit Court correct in overturning the NLRB decision?" (No. 84-677). It is difficult to see how the answer to any of these questions would add to the development or clarification of federal labor law.

cuits.[2] Although they argue that the case is important, since it involves a major industry, they can point to no significant issue of law or policy that should be decided by the highest court. They cite no decision of this Court with which the Fourth Circuit's is in conflict.[3] They invoke an unknown ground for certiorari—"the last clear chance doctrine."[4] The entire thrust of the six petitions is dissatis-

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[2] Indeed, there would appear to be complete harmony. Every jurist who has defined the work in controversy as this Court did in *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980), arrived at the same conclusion reached by the court of appeals below. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); *Int'l Longshoremen's Ass'n (Consol. Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman); *Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706, 712-14 (2d Cir. 1976) (Feinberg, J. dissenting), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975) (Merhige, J.), *rev'd*, 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J. dissenting); *Consol. Express, Inc.* v. *New York Shipping Ass'n*, 452 F. Supp. 1024, 1040 n.14 (D.N.J. 1977) (Stern, J.), *modified on other grounds*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied*, 451 U.S. 905 (1981); *Int'l Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[3] The only conflict which the petition on behalf of the National Labor Relations Board (No. 84-861 Petition at 29) can conjure up is not with a decision of this Court but only with a "rationale." Certiorari may be appropriate if a conflict exists with a decision. Sup. Ct. R. 17.1(c). No authority, however, sanctions Supreme Court review for only a disagreement in rationale. Moreover, there is no conflict. The "rationale" to which the petitioner alludes is not that of this Court but of one of the litigants in an earlier case. The petition manufactures the putative rationale by extracting a single word, "eliminated," used by the Court to describe the contention raised by a party. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 510-11 (1980).

[4] Two petitions (No. 84-696 Petition at 22; No. 84-861 Petition at 22-23, 29-30) contend that this case will probably represent the last opportunity for this Court to review the Rules on Containers. These petitioners seem to be under the misimpression that the Supreme Court is now a standing tribunal to pass on this single

(footnote continued on following page)

faction with the result below. They ask the Court to eschew its proper function and to sit simply as another layer in the appellate process.

This Court has already established the legal principles that govern the decision in this case. *NLRB* v. *International Longshoremen's Association,* 447 U.S. 490 (1980). The Court of Appeals for the Fourth Circuit easily applied them to correct a patent error of law in the decision of the National Labor Relations Board. This Court had directed the Board to decide whether the work retained by the Rules, *i.e.*, the stuffing and stripping of carriers' containers at the piers, is the historical and functional equivalent of traditional longshore work. 447 U.S. at 507. The Board, affirming its administrative law judge, found that it is and so held that the Rules on Containers are lawful work preservation provisions (Petitioners' Appendix at 53a, 59a, 119a). The court of appeals affirmed (Petitioners' Appendix at 24a). This Court had directed the Board to decide whether the longshoremen's employers had the right to assign this work to them. The Board, again affirming its administrative law judge, found that the longshoremen's employers do have the right of control (Petitioners' Appendix at 51a-52a). Once more, the court of appeals affirmed (Petitioners' Appendix at 24a).[5]

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collective bargaining agreement. Moreover, the Court in another context recently refused to credit the hobgoblin of a last chance attitude. *See United States* v. *Stauffer Chemical Co.*, —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388, 395 n.6 (1984) (No. 82-1448). Petitioners in this case would have been well-advised to heed the Court's instruction that there is no need to "seek certiorari from adverse decisions when such action would otherwise be unwarranted" merely out of fear that no future opportunity will arise, especially since the Court let it be known that it would not alter its "practice of waiting for conflicts to develop before granting the government's petitions for certiorari." 78 L.Ed.2d at 395 n.6.

[5] Some of the petitioners urge that the ALJ, the Board and the court of appeals were all wrong in finding right of control (No.

(footnote continued on following page)

Having completed the task assigned by this court, the Board then wandered into a manifest error of law. Despite its holding that the Rules retain for longshoremen the functional and historical equivalent of their traditional work, the Board concluded that these same Rules were unlawful when applied to containers destined for short-stopping or warehousing (Petitioners' Appendix at 59a-60a). The Board predicated this determination upon the theory that an agreement to retain work that has been eliminated is unlawful. It attempted to lend credibility to this theory by affixing the label "work acquisition" to the challenged agreement, despite the absence of any factual finding that off-pier work functions were or could be transferred to the longshoremen.[6]

The court of appeals had no difficulty disposing of the Board's error. It applied longstanding and well-settled principles of federal labor law which leave no doubt that an agreement to retain work that technological change has

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84-691 Petition at 13-24; No. 84-696 Petition at 17-21). They claim that these tribunals should have taken into account the proscriptions of federal shipping law in determining the legality of the Rules under federal labor law. The approach suggested would require the NLRB to decide difficult questions arising under the shipping statutes which the Federal Maritime Commission, the agency to which Congress has entrusted this task, has not yet resolved. The legality of the Rules under federal shipping law is presently before the FMC. *See 50 Mile Container Rules*, FMC No. 81-11. These shipping law questions are hardly ripe for review by this Court.

[6] Some of the petitioners seek to supply the missing factual finding by constructing scenarios in which off-pier work might be lost (No. 84-861 Petition at 27-28; No. 84-869 Petition at 15; No. 84-696 Petition at 12; No. 84-684 Petition at 10 n.7). None of these hypothetical occurrences is alleged to have happened in fact. None was invoked by the Board as a basis for its decision. None is a necessary consequence of the Rules but comes about only as a result of the choice of off-pier employers.

eliminated as a necessary function is perfectly permissible primary activity (Petitioners' Appendix at 26a-29a).[7]

The plea for a "definitive resolution of the validity of the Rules" (No. 84-861 Petition at 28) is disingenuous. The Fourth Circuit's decision is definitive.[8] It brings the verdict on the Rules into congruence with the law enacted by Congress and elucidated by this Court. It puts to rest all uncertainties concerning the validity of the Rules and thus achieves the labor stability which the Board purportedly espouses. It is the Board which would prolong the discord, not to seek a definitive resolution but a favorable one.[9]

Litigation over the Rules on Containers over the past 15 years since their adoption has consumed an inordinate amount of judicial and administrative resources. It has

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[7] The bulk of every petition is devoted to an attempt to reargue the merits of the case before the Fourth Circuit. This is inappropriate in an application for a writ of certiorari and, accordingly, this brief will not respond in kind. However, respondents are appending their reply brief below, should the Court wish to know their position on the merits.

[8] The decision of a United States court of appeals is definitive, notwithstanding the Board's refusal to admit it. The NLRB makes no bones about its policy of disregarding decisions of federal appellate courts with which it is displeased. Although this policy has been strongly criticized by ten circuits, the Board persists. Its refusal to abide by the decision in this case, pending application to this Court, prompted respondents to petition for writs of mandamus and prohibition to compel the Board to comply by discontinuing further litigation it had initiated against the Rules in derogation of the decision of the court of appeals. *In re Int'l Longshoremen's Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

[9] Inexplicably, the Board has indicated its intent (No. 84-861 Petition at 22 n.8) not to oppose the petitions which seek review of that portion of the decision below which sustained the validity of the Rules, where a unanimous court affirmed a unanimous Board in affirming its administrative law judge. With that kind of unanimity, one would think that those issues at least have been definitively adjudicated. It is difficult to reconcile the Board's willingness to reopen these issues with its goal of certainty and stability.

generated 13 circuit court, 14 district court and 10 NLRB proceedings, as well as two determinations on the merits by this Court. The decision of the court of appeals below has brought the wheel full circle. The status of the Rules on Containers is precisely where it was after the first ALJ found them to be lawful work preservation provisions almost a decade ago. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman). The time has come to say "Enough!" The pique of disappointed litigants is no basis to add another unnecessary chapter. There is no reason for Supreme Court review. The petitions should be denied.

Dated: New York, New York
December 27, 1984

Respectfully submitted,

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ADDENDUM

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and
TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCS, FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC., TWIN EXPRESS, INC., and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

and

SAN JUAN FREIGHT FORWARDERS, INC.,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL BALTIMORE, MARYLAND; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416A, 1429, 1458, 1526, 1526A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; STRACHEN SHIPPING COMPANY; and MARINE TERMINALS, INC.,

Respondents.

SHIPPING GROUP'S REPLY BRIEF

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TIDEWATER MOTOR TRUCK ASSOCIATION, and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

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Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

As to the Trucking Group:

The NLRB's and Shipping Group's principal briefs leave no doubt that the Rules on Containers are lawful work preservation provisions on their face. These briefs dispose of the contentions advanced by the Trucking Group.

The work preservation argument that the Trucking Group urges depends upon the existence of a "new intermodal transportation system" into which it claims that the work of stuffing and stripping the longshore employers' containers has been inseparably integrated (Trucking Group's Brief ("TGB") at 12-31). Both the ALJ and the

Board found otherwise (Bd at 16 (A. 163); ALJ at 31-37 (A. 44-50)). Their factual determinations are supported by an abundance of record evidence (A. 254, 258, 266-67, 322, 342-43, 351-52, 383-89, 426-28, 432-33, 452-54, 469-71, 545, 598-99). Moreover, the Trucking Group's argument has already been rejected by the District of Columbia Circuit. *International Longshoremen's Association* v. *NLRB ("ILA")*, 198 U.S. App. D.C. 157, 613 F.2d 890, 909-10 & n.173 (1979), *aff'd*, 447 U.S. 490 (1980). The Trucking Group's obstinate adherence to its discredited theory is futile.

The Trucking Group's right of control argument rests upon two fictions. First, it claims that the Board never considered the right of control issue (TGB at 32-37)—an untenable contention in light of the ALJ's careful analysis (ALJ at 58-60, 75 (A. 71-73, 88)), which was adopted by the Board (Bd at 18 n.30 (A. 165)). Second, the Trucking Group's invocation of contractual common-carrier obligations (TGB at 37-45) would require the NLRB to determine the validity of the Rules on Containers under federal shipping law—an endeavor the Federal Maritime Commission has not yet been able to complete to the satisfaction of an appellate court.[1] The Board correctly declined to trespass upon an area beyond its jurisdiction, *Local 1976, Carpenters* v. *NLRB ("Sand Door")*, 357 U.S. 93, 110-11 (1958), and rightfully branded any linkage of the outcome of this labor law case to the uncertainties of pending FMC litigation "mischievous." (ALJ at 72 (A. 85)).

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[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

As to the NLRB:

The only real issue in this case is the legal soundness of the Board's trucking and warehouse rulings. The NLRB's brief ("NB") leaves no doubt that this issue is purely one of law (NB at 50-54).

1. *The Board's Decision*

The Board's ruling invalidated application of the Rules to certain trucking and warehouse operations purportedly because it was work acquisition (Bd at 26-27 (A. 173-74)). The Shipping Group's Brief ("SGB") showed that the conclusion of work acquisition was a mere assumption unsupported by any finding of fact or record evidence (SGB at 42-49). Indeed, the Shipping Group demonstrated that the stripping/stuffing of containers at the piers can in no way lessen the work performed by trucking or warehouse employees at off-pier sites (SGB at 42-46). Since, without work loss, there can be no acquisition, the Shipping Group exposed the Board's finding of illegality as one predicated solely on its conclusion that longshore work has been "eliminated." (SGB at 47-48).

The Board's brief to this court concedes the correctness of the Shipping Group's analysis. The NLRB has now abandoned any pretense of work acquisition. The word "acquisition" appears four times in the 64 pages of the Board's brief (NB at 23, 39, 49), but only once in connection with the Board's decision in this case (NB at 49). Even here, it is not given its ordinary meaning. It is dressed up in quotation marks, suggesting that the Board in its decision did not mean that longshoremen were in fact acquiring work in the real world but, rather, used the term "acquisition" as a technical catchword to denote unlawful activity.

Just as in the Board's and ALJ's decisions work acquisition is an assumption, not a finding of fact, so too

in the Board's brief to this court. There is not a single citation in that brief to any record evidence in support of a factual finding that application of the Rules to truckers and warehousemen caused longshoremen to acquire the off-pier employees' work. If work acquisition had really been a factual determination in its decision, one would expect the Board to point to those portions of the record that support its finding. After having received the Shipping Group's brief, which openly challenges any claim that off-pier work is being acquired, surely the Board's brief would have responded by supplying the missing evidentiary support. It does not because none exists. Instead, the Board jettisons "work acquisition" as a necessary element and now seeks to persuade this court that work "elimination" alone suffices to overcome the Board's own determination that the Rules are generally valid work preservation provisions.

The Board's brief confirms the Shipping Group's demonstration that the decision under review is predicated on the principle of law that eliminated work may not be the subject of a lawful work preservation agreement. The Board's brief states that "agreements to cease doing business in connection with claiming work that technology has eliminated are not primary agreements." (NB at 52). This is an error of law.

The Board cites no authority in support of its theory because neither the NLRB itself nor any judicial tribunal has ever endorsed it. The controlling authorities have consistently upheld agreements to preserve or reacquire eliminated work. *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Meat Drivers*

Local 710 v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964).

2. *The Board's Brief*

The Board's decision in this case rests upon the naked assertion that the attempt to preserve eliminated work is illegal work acquisition (Bd at 27 (A.174)). In an effort to rescue this implausible postulate, the Board's counsel goes to even more extreme lengths, which, rather than salvage the Board's decision, actually underscore its fundamental infirmities. The Board's counsel conjures up something old and something new. He introduces a distinction never before voiced and dredges up an old discredited theory. Neither of these appear in the Board's decision.[2]

First, the Board's brief attempts to undermine the well-established law of work preservation by introducing a spurious distinction never before drawn either in the decision on review or in any prior case. The Board's counsel claims that the legality of the agreement turns on whether the work has been "eliminated" or "diverted." (NB at 52). This semantic game is devoid of legal significance.[3] From the point of view of the workers, it matters not whether the work has been transferred to another work site or gone to the Valhalla of the victims of tech-

[2] These *post hoc* rationalizations by agency counsel are unacceptable to support the decision on review. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *Edward J. DeBartolo Corp.* v. *NLRB*, 662 F.2d 264, 271-72 n.6 (4th Cir. 1981). An appellate court must adjudge an administrative decision on the basis of the reasons articulated in the agency's decision itself. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Austin* v. *Jackson*, 353 F.2d 910, 912 (4th Cir. 1965).

[3] Board counsel's distinction is logically distorted. Manifestly, attempts to reinstate "diverted" work require a greater involvement of third parties than the resuscitation of "eliminated" work. Both are lawful work preservation, but the former is nearer the dividing line between primary and secondary activity.

nology. In either case, their work is lost, and the workers' efforts to compel their employer to return it are primary.

The controlling cases simply do not bear out Board counsel's attempted distinction. The Supreme Court in *National Woodwork* did not speak in terms of "diverted" or "displaced" work, but rather "employers' efforts to *abolish* . . . jobs." 386 U.S. at 640 (emphasis added). So too, the Eight Circuit in *American Boiler* and the District of Columbia Circuit in *Meat Drivers* sanctioned the recovery of *"lost"* work. 404 F.2d at 554; 335 F.2d at 712 (emphasis added). Moreover, the facts in these cases reveal that the work in controversy had been eliminated, not merely diverted. In *National Woodwork,* the work of cutting and fitting blank doors had been integrated into the manufacturing process. There were no carpenters at the manufacturers' plants to whom the work was diverted. The machines produced doors already fitted to their jambs. The work of mortising, routing and beveling had been eliminated by the prefabrication technology. The prepackaged boilers in *American Boiler* had the same work elimination effect. The manufacturing process had abolished, not diverted, the plumbers' on-site trimming work.

In *Meat Drivers,* the work of distributing meat products within the 50-mile Chicago area from a metropolitan processing plant had been eliminated by the establishment of a suburban plant. Distribution from the city plant was no longer a necessary step in the process of getting the meat from the suburban plant to the Chicago customers. The court of appeals upheld an agreement requiring the employer to have the meat transported first to the city plant thence to the customers by its employees at that plant rather than directly from the suburban plant to the customers by independent over-the-road truckers retained by the employer. *Meat Drivers* is particularly instructive

because it demolishes the Board's attempt in this case to introduce "duplication" as a disqualifying factor (Bd at 26-27 (A. 173-74)). Obviously, delivery directly from the suburban plant was a more economical, convenient and efficient practice. Transfer to the city plant was a duplicative, make-work step. Nevertheless, the city employees' insistence that it be done to reintroduce their lost work was lawful, primary activity, even though it had the effect of disrupting the employer's arrangements with the over-the-road contractors.[4]

Second, the Board's brief reaches back to an earlier era to urge that it is the "cease doing business" factor which makes the attempt to preserve eliminated work unlawful (NB at 53 and n.43). The case cited for this proposition, *Painters & Paperhangers Local 27 (Glaziers) (Joliet Contractors Association)*, 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953), was decided not only prior to *National Woodwork* but also before the 1959 amendments to § 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4) (1976), which introduced the proviso "that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[5]

Prior to the enactment of the primary proviso, it was tenable to suggest that a violation could be predicated on a mere cessation of business. Indeed, the Seventh Circuit in reviewing *Glaziers* said "we are not convinced that

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[4] The Board itself reached a similar result in *Plumbers Local 636 (Mechanical Contractors Ass'n)*, 189 N.L.R.B. 661 (1971) where a duplicative practice of disassembling and repiping prefabricated units was upheld as valid work preservation.

[5] The courts extended this primary proviso to agreements challenged under LMRA § 8(e), 29 U.S.C. § 158(e) (1976). *See National Woodwork*, 386 U.S. at 634-43.

a Union violation . . . is dependent upon whether its activities are primary or secondary." 202 F.2d at 610. Once Congress passed the proviso, however, *Glaziers* lost all precedential value, and a different mode of analysis was mandated.[6]

Under the present state of the law, three elements are necessary to establish a violation of LMRA § 8(b)(4) or § 8(e): (1) inducement (threats or coercion), (2) cessation of business, and (3) secondary objective. While it is still necessary to find a cessation of business, that element is no longer determinative. It must be shown that the cessation is a result of secondary, not primary, activity. The primary/secondary analysis is the crucial touchstone, and it is totally independent of the cessation of business element. The primary/secondary determination turns upon the motivation for the cessation. Where the cessation is the result of primary activity, no violation occurs. Thus, the Supreme Court has repeatedly held that the effect on third parties, *i.e.*, the cessation of business, "no matter how severe, is irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral." *ILA*, 447 U.S. at 507 n.22, *citing NLRB* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507, 510, 526 (1977); *see also National Woodwork*, 386 U.S. at 627.[7]

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[6] In its later determination in *National Woodwork*, the Seventh Circuit itself recognized the obsolescence of its prior affirmance of *Glaziers*. 354 F.2d at 598.

[7] This same analysis has been articulated by the Supreme Court:

> Under § 8(b)(4)(B) of the National Labor Relations Act, 29 USC § 158(b)(4)(B), a union commits an unfair labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8(b)(4)(B) in 1959, declares that the section 'shall [not] be construed to make

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The theory now proposed by the Board's counsel, which makes the cessation of business the crucial factor, would in effect repeal the primary proviso. Since even the most pristine primary work preservation agreement has some effect on third parties, which, as the Board reminds us, is sufficient to make out a cessation of business (NB at 29 n.26, *citing NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297 (1971)), virtually every work preservation agreement would be vitiated if Board counsel's view were to prevail.[8]

Board counsel's attempts to buttress the decision under review are unavailing. His diversion/elimination distinction and "cessation of business" theory are contrary to well-established precedent and to the express provisions of the statute. However, they serve one useful purpose. They betray a recognition that the Board's decision as ren-

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> unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.
>
> Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket its employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer.

Pipefitters, 429 U.S. at 509-10 (footnotes and citation omitted).

[8] The change in business practices which would constitute the "cessation of business" element of the Board's trucking and warehouse rulings in this case is minimal. It consists of the delivery of cargo to off-pier sites in a truck rather than a steamship carrier container. To the off-pier employees the vehicle in which the cargo is transported makes no difference. Their work is the same in either case. The change in business practices is so slight and insubstantial as to place in doubt whether the "cessation of business" element has in fact been established. *See Operating Engineers, supra,* 400 U.S. at 305. If the alleged "cessation" in this case suffices, what work preservation agreement could survive?

dered needs shoring. The fact that the best support Board counsel was able to devise is insufficient shows that the decision is indefensible.

3. *The Controlling Law*

The Board's trucking and warehouse rulings are unable to withstand scrutiny under the basic principles of the work preservation doctrine. In this case, however, there is a more definitive standard—the Supreme Court's decision in *ILA*, which dealt with this very litigation. The Board's rulings part company with *ILA* in every respect. The *ILA* Court admonished the Board for erroneously focusing "on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping." *Id.* at 507.[9] In its trucking and warehouse rulings, the Board continues to define the work in dispute as the post-containerization work performed by the trucking and warehouse employees (Bd at 24 (A. 171)).[10]

The *ILA* Court required the Board to focus on the longshoremen's work prior to the innovation and to evaluate the

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[9] Neither the Supreme Court nor the District of Columbia Circuit in *ILA* nor any other tribunal which has addressed this case has ever made any distinction between application of the Rules to consolidators and their application to truckers and warehousemen. The reason is self-evident. The traditional work of longshoremen and the on-pier work the Rules seek to retain are the same whether the container comes from/goes to a consolidator, NVO, trucker or warehouseman. Regardless of the off-pier entity, the longshoremen perform the same work. The test in each instance remains the same: whether that work is historically and functionally related to traditional longshore work, and the Board has answered that question in the affirmative.

[10] Even if the Board's "elimination" theory were not legally erroneous, it would still be reversible error for the Board to apply that theory in this case. The Board disregards the Supreme Court's direction. It views the Rules on Containers in hindsight. While it is true that containerization had the potential for eliminating longshore work, this elimination with respect to warehousing and shortstopping had not occurred at the time that the Rules were adopted in 1969. From the inception of containerization un-

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functional and historical relationship between this traditional longshore work and the work retained by the Rules. 447 U.S. at 507, 509-10. In its trucking and warehouse rulings, although it had already found that the work the Rules propose to preserve is functionally and historically related to traditional longshore work and has not been integrated into off-pier work practices (Bd at 16, 24-27 (A. 163, 171-74); *see also* NB at 34-37), the Board simply eschewed these critical findings and embarked upon its "elimination" theory.

The Board's theory cannot be reconciled with *ILA*. The Supreme Court recognized that the need for longshore work had been eliminated by containerization, 447 U.S. at 509, but did not consider this elimination to be a determinative factor. The Court mandated a further inquiry:

> whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

447 U.S. at 510 (footnote omitted). The Court thus zeroed in on the key factor for determining a violation of §§ 8(b)(4) and 8(e): whether the challenged agreement has a primary or secondary objective—an inquiry the Board

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til the 1973 Dublin Supplement, containers destined for stripping at local warehouses and trucking stations were routinely stripped at the piers (A. 1082-83, 1085-86, 1159-60, 1181). In the Dublin Supplement, the longshoremen agreed not to strip warehouse-bound containers but only on the condition that their contents be genuinely warehoused for the customary 30-day period. It was to preserve this work from elimination that the Rules were adopted. Any elimination that may have occurred thereafter resulted from 10 years of injunctions, not from "the technology, as the ILA agreed to have it operate." (NB at 49). Thus, the "elimination" upon which the Board's theory depends did not exist at the time the agreement was adopted, the temporal context in which, under the Supreme Court's decision, the Rules must be adjudged.

completely loses sight of in concocting its elimination theory.

The Supreme Court has repeatedly said that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645 (footnote omitted); *Pipefitters,* 429 U.S. at 511; *ILA,* 447 U.S. at 504. The Board had no difficulty finding that the agreement to have longshoremen stuff and strip their own employers' containers at their own employers' premises "had an overall work preservation objective." (Bd at 25 (A. 172)). The touchstone, therefore, was completely satisfied. In its trucking and warehouse rulings, the Board does not mention the touchstone. It offers no explanation how the longshoremen's "valid work preservation objective" becomes secondary when their agreement is applied to warehousemen and truckers. The fact that in those instances the Board believes the work has been "eliminated" in no way changes the primary nature of the agreement. The longshoremen are still bargaining with their own employers to have them revive the lost work. If, as the Board suggests, the work has in fact been eliminated, no other employees can be doing it. The longshoremen's agreement, then, cannot be "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644. Nothing can be more primary than an agreement to preserve "eliminated" work.

The only way such an agreement could become secondary would be if its application reached out to acquire other employees' work not previously performed by the contracting employees. *National Woodwork,* 386 U.S. at 630-31 and at 648 (Harlan, J. concurring). In this case, unlawful acquisition could occur only if the longshoremen's work had become inseparably integrated into the work of the off-pier employees—which the Board in this case found not to be the fact (Bd at 16, 24-27 (A. 163, 171-74); ALJ

at 31-37 (A. 44-50)).[11] The Board's decision did not find, nor does the Board's brief claim, that any off-pier work is being transferred to the docks by application of the Rules. *See* pp. 3-4 *supra*. The invocation of "elimination" does not supply the necessary secondary element.

The Board recognizes that acquisition is necessary. The bottom line of its decision is, "Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective." (Bd at 27 (A. 174)). However, in the light of its own factual findings, the Board cannot say that the work of off-pier employees is being acquired. Rather, it attempts to justify its decision by labelling as "acquisition" the attempt to retain "work that the technology, as the ILA agreed to have it operate, 'eliminated the need for.'" (NB at 49). This "eliminated" work is longshore work, not off-pier work. Unlawful acquisition occurs only when the work acquired is someone else's. Only then is it secondary. Acquiring one's own work is quintessentially primary. Indeed, it is not acquisition at all. It is work preservation.

The Board attempts to stigmatize this perfectly lawful conduct by expanding the term "acquisition" to include that which it has never meant in a manner that obliterates the distinction between primary and secondary. The Board appeals to this court to defer to the Board's discretion (NB at 51, 53). But judicial deference is neither absolute nor blind. *NLRB* v. *Brown*, 380 U.S. at 278, 292 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). It does not include sanctioning an Orwellian perversion of the plain meaning of the language which, if unchecked, would abolish the doctrine of work preservation.

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[11] The opponents of the Rules have always recognized the need for integration to invalidate the Rules. They have always predicated their challenge on the contention, albeit fallacious, that longshore work has been inseparably integrated into the "new intermodal transportation system." *See, e.g.*, TGB at 17.

CONCLUSION

For the foregoing reasons and those set forth in the Shipping Group's Principal Brief, the Board's trucking and warehouse rulings should be reversed, the applications for enforcement in Nos. 83-1424 and 83-1486 denied, and the Rules on Containers declared lawful work preservation agreements in their entirety.

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Respectfully submitted,

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